INTERIOR BOARD OF INDIAN APPEALS

Estate of Joseph Caddo, a.k.a. James Joseph Caddo and Jim Butler

7 IBIA 286 (11/28/1979)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF JOSEPH CADDO
a.k.a. JAMES JOSEPH CADDO AND JIM BUTLER

IBIA 79-23 Decided November 28, 1979

Appeal from order by Administrative Law Judge Sam E. Taylor denying petition for rehearing of order approving will and decreeing distribution.

Remanded with instructions.

1. Indian Probate: Wills: Contest--Indian Probate: Wills: Proof of Will

   Provisions of 25 CFR 4.233(c) requiring testimony of attesting witnesses to contested will to be taken at hearing on probate of will are mandatory when witnesses are available.

2. Indian Probate: Wills: Undue Influence: Generally

   Whether undue influence had been exerted to obtain will of testator in feeble health and dependent situation is the sole issue in case where the will was obtained with the assistance of testator's son-in-law who stood to benefit under the will made and who used a power of attorney to make gifts of testator's money to others.

3. Administrative Procedure: Adjudication--Administrative Procedure: Initial Decision

   Where determination of issues of fact turn upon weight to be given to conflicting testimony, findings of fact concerning testimony are required to be made by the initial trier of fact.

APPEARANCES: Amos E. Black III, Esq., for appellants James Joseph E. Jones and Jesse Jerald E. Jones; Virgil L. Upchurch, Esq., for appellees Katherine Corrine Butler Jones and Jesse Julius E. Jones.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Appellants, grandsons of testator Joseph Caddo, seek relief from an order denying their petition for rehearing after order approving will and decreeing distribution. Appellants urge on appeal, as they did at the hearing on probate of will, that decedent's will admitted to probate is invalid because it was procured by fraud and did not express the desire of decedent who was not capable of making the testamentary act under the circumstances prevailing upon him when he signed the questioned document. Their attack upon the 1975 will left by decedent raises the issues addressed on appeal.

Decedent, a Caddo allottee, died at Anadarko, Oklahoma, on February 23, 1978, at the age of 81, 1/ leaving trust property consisting of land in Oklahoma and a cash account at the Anadarko Bureau of Indian Affairs (BIA) Agency. Three wills left by him were found, the last drawn in 1975 by a lawyer in private practice in Anadarko. Two earlier wills drawn by BIA staff attorneys in 1968 and 1974 were produced from Agency records, and constitute part of the record on appeal.

Decedent was twice married: his first wife died in 1951. He remarried in the late 1960's to Emma Osborn, a Wichita allottee. Shortly after his marriage to Emma, decedent made a will on November 6, 1968, devising his property equally between his grandsons (appellants) and Emma. On January 18, 1974, reciting an agreement with his wife and the adequacy of her own property holdings as reasons for the change, he made a new will disinheriting Emma and devising his estate equally among his surviving daughter Katherine and infant grandson Jesse Julius Ewehottino Jones (appellees) and appellants, the sons of his deceased daughter Geraldine.

Decedent had suffered a stroke in April 1968 which paralyzed his left arm and leg, after which he experienced successive blockages of the veins in other parts of his body. His health began to decline generally; he was easily confused and his judgment was impaired, a circumstance that was worsened by the failure of Emma's health. Although both decedent and his wife needed custodial care, they continued to live in their home in Anadarko, until Emma died on June 10, 1975. Immediately after Emma's death, appellee Katherine Jones' husband, Jesse Lee Jones, moved decedent to the farmhouse near Anadarko

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1/ His birthday is reported to be both July 7, 1895, and July 7, 1897.

belonging to appellee. The testimony of witnesses who are neither heirs or legatees indicates that by this time decedent's health had become very frail. 2/ Crippled and weak, he required custodial care.

Jesse Lee Jones, decedent's son-in-law, had married both of decedent's daughters. He married Geraldine, the appellants' mother, in 1950 when she was 19 and Jones was 22. In 1960 the couple adopted Jeanette Kay Jones, the illegitimate child of Jones' sister. Jeanette was later adopted back by her natural parents following their marriage. 3/ Sometime before the 1964 parental adoption of Jeanette, Geraldine died.

In February 1965, Jesse Jones secured the release from commitment of appellee Katherine Corrine Jones, who had been confined 6 months earlier as a mentally retarded person. She was 43 and Jones was 37 when, 3 days after her release from the hospital, they were married. In 1972 Jones arranged through relatives for the adoption of the baby Jesse Julius, who was 3 years old when decedent came to live at the Jones' house. By the time decedent moved to their farmhouse in 1975, Jones' other two sons, appellants, had moved from the house for most purposes, although they still came frequently to the farm, in which they were part owners. 4/ They continued to help with some work around the place, and occasionally stayed there.

Just prior to the time decedent moved to the farm, Jones built and improved two fences enclosing the 80-acre tract where it was situated, and put locks on the fence gates. At about the same time, according to testimony by Jesse Jerald, Jesse Jones had proposed to his son Jesse Jerald that they should bring decedent to the farm, persuade him to make a will naming Jesse Jerald decedent's sole heir, secure a power of attorney from the old man, and then keep him restricted to the farm afterwards by the use of the power of attorney so that he could not change the will. Appellant Jesse Jerald refused the proposal.

On July 16, 1975, after decedent had been in his care about a month, Jesse Jones took decedent to a lawyer's office where a will was drawn devising decedent's estate equally between appellees, Jones' wife and minor son. The lawyer had never talked to decedent before that day. He was acquainted, however, with Jesse Jones. After the will was signed Jones returned decedent to the farm.

2/ Witnesses Eloise Sumpter and decedent's niece Arlene Hendrix so testified.

3/ The legal effect of this adoption which occurred after the death of Geraldine is correctly analyzed by the order approving will and decreeing distribution. Jeanette is an heir of decedent.

4/ They derive their interest in this trust property from their mother.

A month later, on August 7, 1975, Jesse Jones again took decedent to the same lawyer who prepared a statutory form of power of attorney for decedent, making Jesse Jones his attorney-in-fact. The power was executed formally before a State District Court Judge, and recorded in conformity to a State statute. 5/ Denominated a "special power of attorney" the document recites that it is given "in anticipation of infirmity" to insure that money due to decedent is collected and that his property is properly cared for and his assets preserved. The next day, August 8, the power of attorney was used by Jesse Jones, acting as decedent's agent, to transfer $5,875.35 from decedent's personal bank account at a local bank to a trust account. Despite regular monthly payments from social security and rent monies, the account balance at decedent's death was $12.78. The money was spent in part to buy a bull for the herd at the Jones' farm, to build a shed and cellar on land owned solely by appellee Katherine, and to improve fences. Some of the trust money went for wages to Jones' hired man. The amount spent on those items totals about $3,000. The balance is not accounted for, although it appears that decedent received three meals daily, three tablets prescribed by his physician, and the use of his own room at the farmhouse. Jesse Jones testified he spent the money according to directions from decedent. Decedent was cared for by appellees, and constantly attended by Jesse Jones, who took him to the barber monthly, and to other places in town where he transacted business. The exhaustion of the Anadarko bank account was the only use made of the power, since BIA officials refused to accept Jones as decedent's agent for the execution of leases or withdrawal of money from the Agency trust funds.

5/ The power of attorney recites it is made pursuant to "Title 58, Oklahoma Statutes 1971, Sections 1051 through 1061, both inclusive, as amended." The statute cited has another section, 58 Okl. Stat. 1971, section 1062, which provides:

"§ 1062. Effect of acts of attorney--Termination of power

"All powers of attorney other than those executed in anticipation of physical or mental infirmities shall be irrevocable if any such infirmity occurs only if the principal so states in the writing by which the power is granted. All acts done by the attorney in fact or agent pursuant to the power during any period of infirmity shall bind the principal. Any power of attorney so granted shall terminate on the written revocation by the principal, death of principal, appointment of a guardian of the person and/or property of the principal, unless the order of appointment otherwise provides, or upon its expiration or termination according to its terms. Laws 1974, c. 158, §2."

Since the interview between the District Judge, Jones, the decedent, and the attorney who drew the power of attorney is not recorded, there is no explanation for the omission from the power of a reference to the statutory requirements of termination of agency.

From the time of his wife's death in 1975, decedent was invariably accompanied by Jesse Jones when in public or when there was business to be done. Decedent's friends visited him infrequently and for short times at the farmhouse. He did not go out alone, partly because of the paralysis of his leg and arm and his increasing feebleness, but, according to testimony by appellants, also because he was not permitted to be alone with others. According to James Joseph Jones, the decedent occasionally became self-assertive and he tried, on two occasions in 1977, to go to the Agency Field Solicitor's Office after declaring he proposed to change his will. According to Jesse Joseph, decedent was stopped by Jones and by Jesse Joseph, acting at Jesse Jones' direction.

[1] The provisions of 43 CFR 4.233(c) require the examination of attesting witnesses to a contested will at the probate hearing contest. 6/ Although the attorney who drew the will appeared as a witness, neither attesting witness did so. The testimony by the attorney established the availability at the place of hearing of both attesting witnesses. Their failure to appear in a case where the competency or volition of the testator was in issue results in a failure of proof, both because it is in direct contravention of the regulatory requirement and because it leaves unsatisfied the need to fully explore the testator's condition as seen by the two witnesses and to fully inquire into the circumstances of the execution of the contested will. 7/ The failure to comply with the regulation requires a rehearing for the purpose of taking the testimony of the two subscribing witnesses as required by regulation.

[2] When called upon to examine a will allegedly procured by fraud, the agency must exercise extreme care not to rewrite a valid will because the action by the testator does not conform to popular opinions of fitness or morality. 8/ Often a will is intended by the testator to change the customary or statutory scheme for devolution of property. Thus, merely because a customary or previous plan of distribution is changed is not an indication of incompetence or an indication fraud was practiced upon the testator. The intentional omission of near relatives is not an indication an Indian testator is

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6/ 43 CFR 4.233(c) provides in pertinent part: "(c) Will Contest. If the approval of a will, codicil thereto, or revocation thereof is contested, the attesting witnesses who are in the reasonable vicinity of the place of hearing and who are of sound mind must be produced and examined."

7/ Estate of Emory Dennis Juneau, 7 IBIA 164 (1979).

8/ Tooahnippah v. Hickel, 397 U.S. 598 (1970); Estate of Dorothy Sheldon, 7 IBIA 11, 85 I.D. 31 (1978). Occasionally the distinction between rewriting a will for mistaken reasons and ascertaining whether a will was procured by fraud can be very close indeed, as shown by the discussion in Estate of Richard Lucero, 1 IBIA 46 (1970).

incompetent to make a will. 9/ Matters to be considered when inquiring into allegations of the use of undue influence include the manner of the procurement of the will, the nature of the advice given concerning the making of the will (if any was given), the circumstances surrounding the actual making of the will itself, whether the changes made mark an abrupt departure from a previously defined testamentary scheme, and whether the testator was unusually susceptible to influence when the will was made. 10/ In situations where the beneficiary or one beneficially interested in the changed will is active in procuring the execution of a will, some authorities indicate the circumstances may give rise to a presumption of undue influence. 11/ Cases dealing with specific facts seem most apt to apply this rule to abuses of the attorney-client relationship 12/, however, rather than cases such as this where a power of attorney is used to establish a principal-agent situation where the agent is not a lawyer. 13/ In such cases where it appears that the attorney-in-fact has abused the trust relationship to take advantage of his principal, the agent's conduct is an indicator that a will, which he assisted the principal to make, may also be invalidly executed. 14/ The general rule in such cases appears to be that an agent may not, on his own behalf, make transactions with his principal respecting the subject of the agency without first making a full disclosure of all the circumstances of the proposed action. 15/ In any event, State law does not control Indian Probate proceedings: the Department must look to the applicable Federal statutes and to its own application of Departmental regulation to decide individual cases. 16/

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9/ Estate of Gerald Martinez, Sr., 5 IBIA 162, 83 I.D. 306 (1976).

10/ Since Tooahnippah v. Hickel, supra, it appears that a will validly executed according to Departmental regulation is valid, absent the degree of imposition that substitutes the will of another for that of the testator. A quadrupedal test for establishing the existence of such a circumstance has evolved in the Departmental practice, as pointed out in the order approving will. Numerous instances where the standard is invoked and applied appear in the reported cases. Estate of Hiemstennie Maggie Whiz Abbott, 4 IBIA 12, 82 I.D. 169 (1975); Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971).

11/ 79 Am. Jur. 2d, Wills §§ 400, 407 (1975).

12/ Hunter v. Battiest, 192 P. 575 (Okla. 1920); Gidney v. Chapple, 110 P. 1099 (Okla. 1910).

13/ Hubbell v. Houston, 441 P.2d 1010 (Okla. 1967).

14/ Matter of Rolator's Estate, 542 P.2d 219 (Okla. App. 1975); Hodges v. Surratt, 366 So.2d. 768 (Fla. App. 1979); McCarthy v. Weatherly, 204 P. 632 (Okla. 1922).

15/ 3 C.J.S. Agency § 282 (1973).

16/ Estate of Elizabeth Frank Greene, 3 IBIA 110, 81 I.D. 556 (1974). In this connection however, it should be noted State probate law applies to cases of intestate succession (25 U.S.C. § 348, 372-373 (1976)).

[3] The recorded testimony establishes the sole issue here to be whether the will was obtained by imposition of undue influence upon decedent. It is hard to determine how that single issue should be decided here on appeal, because the question is so close on the facts presented and because the issue turns ultimately upon the credibility to be accorded the principal witnesses by the finder of fact. The order determining heirs makes no findings concerning credibility of witnesses, although it draws conclusions based upon a statement of general rules developed from Departmental probate practice. This statement, while correct, is uninstructive on the decisive issue here, since it leaves doubt concerning the correct resolution of the dispositive facts. 17/ Findings of fact concerning credibility of the principal witnesses are required by the application of the Administrative Procedure Act to this situation, insofar as the Act makes such findings mandatory when they are necessary to the decision made. 18/ Here, without findings concerning credibility, it is difficult to weigh the testimony by appellants against that of their father to reach a decision. There is an essential conflict in their testimony which must be resolved prior to decision of the case. 19/ To be complete, such findings will also require the analysis of the testimony by several other witnesses who testified concerning their exclusion from the company of decedent by Jesse Lee Jones.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is vacated; the matter is remanded for further hearing to obtain the testimony of the attesting witnesses to the will left by the decedent, and for the entry of findings concerning the credibility of witnesses testifying concerning the issue of undue influence, and

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17/ The order approving will recites at page 4 of the order, that the evidence was received by the fact finder "in the light most favorable to the decedent's grandsons by his predeceased daughter." The conclusion, however, that the 1975 will should be approved, is inconsistent with such a statement. Viewed in the light most favorable to appellants (believing them rather than Jesse Lee) they have prevailed under the rules set out in the Abbott and Robedeaux estates cited in n.10, supra.

18/ Act of September 6, 1966, 80 Stat. 387 (5 U.S.C. § 557 (1976)). This Board has the power to remand for the rendition of specific findings of fact by the initial trier of fact where such findings are necessary to a decision. 43 CFR 4.290; Estate of San Pierre Kilkakhan (Sam E. Hill), 1 IBIA 299, 79 I.D. 583 (1972).

19/ For what could be an analogous situation, depending upon who is to be believed here, see the discussion in Estate of Cyril Dewey Bockius, 3 IBIA 277 (1973), an Indian probate matter where undue influence was found to invalidate a will.

the making of conclusions consistent with the findings of fact as drawn and for such further proceedings as are consistent with this opinion.

This decision is final for the Department.

//original signed
Franklin Arness
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

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Mitchell J. Sabagh
Administrative Judge